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Supreme Court, U.S.
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No. 96-1312

In The

Supreme Court of the United States

October Term, 1996

ROBERT W. KEARNS,

Petitioner,

v.

GENERAL MOTORS CORPORATION AND BROWN'S BUICK AND ISUZU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

ROBERT W. KEARNS, PH.D.
Manufacturing-Inventor
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337

10 pp

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QUESTIONS PRESENTED FOR REVIEW

When does the inventor's consideration —— the "for limited times" of Const. Art. I §8 cl 8 —— start?

When, intermediate into the "for limited times", infringement occurs and is later adjudged—— what happens to the inventor's consideration?

Is the Court of Appeals for the Federal Circuit's opinion supporting denial of five of Kearns' patents to him in an up-coming infringement trial with General Motors Constitutional, **and**, in accord with Part III, § 1, Article 41 ¶¶ 3 & 4 of the Uruguay Round Trade Agreements?

Are the Part III, § 532, (a)(1) [§ 154] patent provisions of the GATT Treaty Constitutional and in accord with 35 USC § 102(b) and the application-to-patent-issue-delay time?

Is the Commissioner of Patent's grant "for the term of seventeen years from the date of this grant" Constitutional?

Are 35 U.S. Code § 281 civil actions with § 284 Damages phases but without § 283 Injunction phases lawful and Constitutional?

Do the Kearns v. Ford and Kearns v. Chrysler & AMC 35 U.S. Code § 281 civil actions require § 283 phase proceedings to be lawful and Constitutional?

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DR. KEARNS' REPLY TO GM'S BRIEF IN OPPOSITION

There is a conflict between
Dr. Kearns' new Constitutional truth
derived rigorously from Art. I § 8 cl 8
and,
both 35 U.S.C. § 154 (1988) and the GATT Treaty.

"This Constitution ... and all treaties made, shall be the supreme law of the land." Const. Art. 6 ¶ 2. Dr. Kearns did not stray from the ratified words of Const. Art. I § 8 cl 8 in his derivation of the new[1] "Constitutional truths" he derived from Const. Art. I § 8 cl 8 at (12) and (18) on page 5 of Dr. Kearns' Petition. Dr. Kearns' new "Constitutional truths" are supported by Professor Mergler , whose academic specialization is *Mathematical Logic*, who also, in his *Amicus Curiae Brief,* endorsed Dr. Kearns analysis. In GM's Brief in Opposition, it did not cite any errors in Dr. Kearns' derivation of the answers to Dr. Kearns' question presented for review:

> "When does the inventor's consideration —— the "for limited times" of Const. Art. I §8 cl 8 —— start?

All Dr. Kearns' U.S. patents are assembled with their issue dates on page 11 of his Petition. None were issued after October 1, 1985. Since Const. Art. I § 9 ¶ 3 is:

> "No ... ex post facto law shall be passed."

---

[1] Said new Constitutional truths: that the "for limited times (plural)" start with 'the first moment of "exclusive right" of clause 8'; and, that the "for limited times"-life-clock stops when infringement occurs intermediate into the inventor's "for limited times" until the inventor's "exclusive right" is re-established through the 35 U.S.C. § 281 'remedy' civil action which means that the "for limited times" can resume and stop, resume and stop, ... giving meaning to the plural "for limited times" in Const. Art. I § 8 cl 8; said derived by Dr. Kearns at (12) and (18) on page 5 of Dr. Kearns' Petition from a complete Const. Art. I § 8 cl 8

There is danger that GM's citation at page 5, beginning the fifth line from the end of page 5:

> "The applicable statutory period for the patents here in suit is seventeen years from the date of issuance. 35 U.S.C. § 154 (1988)."

would mislead this Supreme Court as none of Dr. Kearns' U.S. patents are subject to the 1988 Legislation phrase, *supra*. Hence GM's assertion that "The applicable statutory period for the patents here in suit is seventeen years from the date of issuance." doesn't apply here and is not a truthful answer to Dr. Kearns' question presented for review, *supra*. But since the words of the 1988 Congressional Legislation at 35 U.S.C. § 154 (1988) cited by GM, *supra*, are included in the General Agreement on Tariffs and Trade ("GATT") Treaty at p. 465:

> **Subtitle C — Patent Provisions**
>
> SEC. 532. Patent Term and Internal Priority.
>
> (a) Patent Rights.—
>
> (1) Contents and Term of Patent.— Section 154 of title 35, United States Code, is amended to read as follows:"**§ 154. Contents and term of patent**
>
> "(a) In General.—
>
> "(1) Contents.— ... .
>
> "(2) Term.— Subject to the payment of fees under this title, such grant shall be **for a term beginning on the date on which the patent issues** and ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application or applications under section 120, 121, or 365(c) of this title, from the date on which the earliest such application was filed. (**Emphasis** added.)
>
> "(3) Priority.— ... ."

GM has identified for the Court a conflict, under Supreme Court Rule 10, between said new "Constitutional truths" derived from Const. Art. I § 8 cl 8 and the words: of Congress' Legislation 35 U.S.C. § 154 (1988); and, of the GATT Treaty!

There cannot be two different
supreme laws of the land
on the same subject.

In short, there cannot be two supreme laws of the land! The 35 U.S.C. **§ 40. Same; contents and duration** of Congress' legislation of R.S. § 4884; May 23, 1930, c. 312, § 1, 46 Stat. 376 is silent on when the "for limited times" starts; the 35 U.S.C. **§ 154. Contents and term of patent** of Congress' legislation of July 19, 1952, c. 950, § 1, 66 Stat. 804. is also silent on when the "for limited times" starts; the 35 U.S.C. **§ 154. Contents and term of patent** of the 1965 amendment Pub. L. 89-83 added "subject to the payment of issue fees as provided in this title." and remained silent on when the "for limited times" starts; the 35 U.S.C. **§ 154. Contents and term of patent** of the 1980 amendment Pub. L. 96-517 substituted "payment of fees" for "payment of issue fees" and remained silent on when the "for limited times" starts; and since Dr. Kearns' '066 patent was filed on Jan. 30, 1967, 18 years, 5 months and 23 days before it issued on July 23, 1978 Dr. Kearns would have received but 1 year, 6 months and 7 days of "for limited times" under the 35 U.S.C. § 154 (1988) as his consideration of the '066 invention which the examiner characterized as "too good."

All Dr. Kearns' U.S. patents were issued under the 35 U.S.C. **§ 154. Contents and term of patent** of 1965/80 which was silent on when the "for limited times" starts. Dr. Kearns' U.S. patents have been infringed before the day, on the day, and after the day of their issuance as proven by the record in

Kearns v. *Ford Motor Company* and *Kearns* v. *Chrysler Corp. and American Motors Corp.*

As Dr. Kearns has experienced, when new knowledge has been derived correctly, it becomes easy to go back and check those derived new knowledge results. Here, isn't it obvious that a 'term' of time cannot meet the multiple "resume and stop" requirements of a successful (large number of infringements) invention? And isn't it obvious, that under 35 U.S. Code § 102 that the inventor's patent may be infirnged upon the day of issuance? And isn't it obvious, that the "for limited times" can only first start "with the first moment of exclusive right?" And that that 'first moment of exclusive right' might follow a 35 U.S.C. § 281 'remedy' civil action — as is true here in Petition for Writ of Certiorari No. 96-1312?

Under Const. Art. 6 ¶ 2,
both 35 U.S.C. § 154 (1988) and
the GATT Treaty are unConstitutional.

As shown above, under Const. Art. 6 ¶ 2, the 35 U.S.C. § 154 (1988) and the GATT Treaty are unConstitutional" (as/if) Dr. Kearns and Dr. Mergler are correct.

Respondents improper assertions.

Dr. Kearns doesn't ask that the Supreme Court "extend the life of his patents" as asserted by GM at p. 2, line 10 of their Brief in Opposition — he simply asks for a 'first moment of "exclusive right" under his patents in accord with the U.S. Constitution's proffered consideration to inventor's like himself at Const. Art. I § 8 cl 8.

Nor does Dr. Kearns "ignore the proper application by the Federal Circuit of the principle of *res judicata* as asserted by GM at p. 2 line 12 of their Brief in Opposition — Kearns simply has read the GATT Treaty and knows that the Fed. R. Civ. P. Rule 41(b) in which when a District Judge "does not

otherwise specify" a case which has not resulted in a hearing on the merits is treated "as if" a hearing on the merits occurred does not satisfy the GATT Treaty requirements at Part III, §1, Art. 46, ¶¶ 3 & 4. Under Const. Art. 6 ¶ 2, the GATT Treaty shall shall also be "the supreme law of the land." Fed. R. Civ. P. Rule 41(b) is unConstitutional under the GATT Treaty.

That a 'term' of single period time satisfies the "for limited times" (plural) of Const. Art. I § 8 cl 8 is an unsettled federal law problem. The Federal law of 35 U.S.C. § 40 [1930] did not specify when the (unConstitutional) term of seventeen years starts; that 35 U.S.C. § 154 [1952/65/80] did not specify when the (unConstitutional) term of seventeen years starts either; is other unsettled federal law identified by Kearns to be addressed by this Supreme Court which counters GM's allegation at page 4, line 7.

Congress need but legislate
a quantity of "for limited times"
to promote science and the useful arts.

When Dr. Kearns focuses on Const. Art. I § 8 cl 8 being complete except for Congress identifying the quantity of "for limited times" and finally derives new "Contitutional truths" therefrom, the Judicial practices, made without Constitutional authority justify this Supreme Court determining the standard of compensation for inventors through Dr. Kearns. Would the Supreme Court Justices work in behalf of the public without their compensation standard being established? Why would the Justices expect inventors to be different then themselves? The Constitutional command is to promote science and the useful arts. Is allowing every automobile assembler to infringe Dr. Kearns' 23 U.S. patents in the art of Intermittent Windshield Wiper Systems, and to subject him, improperly, to "lawyer problems" for the thirty-four years since Dr. Kearns brought

his family car equipped with IWWS to Ford, Chrysler, and GM in Sept. '63 - '65 without a proper standard of compensation to enforce on his U.S. patents is a tragedy for the U.S. public. Their jobs depend upon what inventors like Kearns do. Are the Justices entitled to use Dr. Kearns IWWS inventions that they and their family members have on each Justices' cars? Your cars can be of any assemblage — Dr. Kearns has licensed no one. Isn't your Justices "use" a violation of *Roche Products* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858, 862; 221 U.S.P.Q. 937 (Fed. Cir. 1984)? Think about it.

To promote science and the useful arts

To promote science and the useful arts, hear this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, Section 8, Clause 8

"The Congress shall have the Power:

To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Art. I, Section 9, Paragraph 3

"No bill of attainer or ex post facto law shall be passed."

Art. 6, Paragraph 2

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

STATUTES INVOLVED

35 U.S. Codes

§ 40. Same; contents and duration

Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery (including in the case of a plant patent the exclusive right to asexually reproduce the plant) throughout the United States and Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof. R.S. § 4884; May 23, 1930, c. 312, § 1, 46 Stat. 376.

Derivation. Act July 8, 1870, c. 230, § 22, 16 Stat. 201.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof. July 19, 1952, c. 950, § 1, 66 Stat. 804.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of fees as provided for in this title, of the right to exclude others from making, using, or selling the invention throughtout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

As amended July 24, 1965, Pub.L. 89-83, § 5, 79 Stat. 261; Dec. 12, 1980, Pub.L. 96-517, § 4, 94 Stat. 3018.

1980 Amendment. Pub.L. 96-517 substituted "payment of fees" for "payment of issue fees."

1965 Amendment. Pub.L. 89-83 added "subject to the payment of issue fees as provided for in this title."

§ 154. Contents and term of patent

(a) In general.—

(1) Contents.—Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention through-

out the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.

(2) Term.—Subject to the payment of fees under this title, such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application or applications under section 120, 121, or 365(c) of this title, from the date on which the earliest such application was filed.

(3) Priority.—Priority under section 119, 365(a), or 365(b) of this title shall not be taken into account in determining the term of a patent.

(4) Specification and drawing.—A copy of the specification and drawing shall be annexed to the patent and be a part of such patent.

(b) Term extension.—

(1) Interference delay or secrecy orders.—If the issue of an original patent is delayed due to a proceeding under section 135(a) of this title, or because the application for patent is placed under an order pursuant to section 181 of this title, the term of the patent shall be extended for the period of delay, but in no case more than 5 years.

(2) Extension for appellate review.—If the issue of an original patent is delayed due to appellate review by the Board of Patent Appeals and Interferences or by a Federal court and the patent is issued pursuant to a decision in the review reversing an adverse determination of patentability, the term of the patent shall be extended for a period of time but in no case more than 5 years. A

patent shall not be eligible for extension under this paragraph if it is subject to a terminal disclaimer due to the issue of another patent claiming subject matter that is not patentably distinct from that under appellate review.

(3) Limitations.—The period of extension referred to in paragraph (2)—

(A) shall include any period beginning on the date on which the appeal is filed under section 134 or 141 of this title, or on which an action is commenced under section 145 of this title, and ending on the date of a final decision in favor of the applicant;

(B) shall be reduced by any time attributable to appellate review before the expiration of 3 years from the filing date of the application for patent; and

(C) shall be reduced for the period of time during which the applicant for patent did not act with due diligence, as determined by the Commissioner.

(4) Length of extension.—The total duration of all extensions of a patent under this subsection shall not exceed 5 years.

(c) Continuation.—

(1) Determination.—The term of a patent that is in force on or that results from an application filed before the date that is 6 months after the date of the enactment of the Uruguay Round Agreements Act shall be the greater of the 20-year term as provided in subsection (a), or 17 years from grant, subject to any terminal disclaimers.

(2) Remedies.—The remedies of sections 283, 284, and 285 of this title shall not apply to Acts which—

(A) were commenced or for which substantial in-

vestment was made before the date that is 6 months after the date of the enactment of the Uruguay Round Agreements Act; and

(B) became infringing by reason of paragraph (1).

(3) **Remuneration.**—The acts referred to in paragraph (2) may be continued only upon the payment of an equitable remuneration to the patentee that is determined in an action brought under chapter 28 and chapter 29 (other than those provisions excluded by paragraph (2) of this title.

(As amended Aug. 23, 1988, Pub.L. 100-418, Title IX, § 9002, 102 Stat. 1563; Dec. 8, 1964, Pub.L. 103-465, Title V, § 532(a)(1), 108 Stat. 4983.)

§ 281. Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent. July 19, 1952, c. 950, § 1, 66 Stat. 812.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

... .

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.